Supreme Court, U.S.
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88-1664

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

GIACOMO DiNORSCIO, Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In Batson v. Kentucky, this Court established the evidentiary burden of a defendant claiming a denial of equal protection through a prosecutor's use of peremptory challenges to exclude members of his race from the petit jury. The trial court below denied petitioner's Batson claim for discriminatory challenges against Italian-Americans ruling that Batson is limited to blacks and, alternatively, that petitioner failed to establish a prima facie case under Batson.

The questions presented are:

(a) Does the right to equal protection under Batson extend to non-black groups such as Italian-Americans?

(b) If so, does the Batson prima facie case require an Italian-American defendant to make an affirmative showing that

persons with Italian surnames (1) constitute a group that has been singled out for differential treatment, and (2) have been disparately represented on juries in the jurisdiction?

(c) If persons with Italian surnames are seated as jurors, does the requisite prima facie showing increase to one of actual prejudice?

2. Whether The Bail Reform Act of 1984 precludes sentencing under 18 U.S.C. §3147 of a person who was not advised at the time of release of the penalties for committing an offense while released on bail?

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Third Circuit were:

Giacomo DiNorscio

Vincent DiPasquale

Gerald Cohen

Gerald DeLuca

John Sinico

Anthony Truglia

United States of America

Petitioner believes that Vincent DiPasquale, Gerald DeLuca and John Sinico have no interest in the outcome of this Petition.

Gerald Cohen and Anthony Truglia have filed a separate petition.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

GIACOMO DiNORSCIO, Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Giacomo DiNorscio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on December 23, 1988.

OPINIONS BELOW

The opinion of the court of appeals is reported at United States v. DiPasquale, 864

F.2d 271 and is reprinted in the appendix hereto, p. 1a, infra.

The bench opinion of the United States District Court of the District of New Jersey (Barry, J.) which deals with the Batson issue is reprinted in the appendix hereto, p. 28a, infra. The relevant portion of the sentencing is reprinted in the appendix hereto, p. 39a, infra. The judgment and sentence is reprinted in the appendix hereto, p. 43a, infra.

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Third Circuit entered judgment on December 23, 1988. No petition for rehearing was sought. On January 24, 1989, Justice Brennan ordered that the time for filing this petition for writ of certiorari be extended to and including March 23, 1989. An additional period of time was allowed until April 19,

1989 by letter from the Office of the Clerk of the Supreme Court of the United States dated March 24, 1989 (received March 29, 1989).

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1) and Rule 21, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides, in relevant part:

> [No person shall] be deprived of life, liberty, or property, without due process of the law; nor shall private property be taken for public use without just compensation.

18 U.S.C. 3147 - Penalty for an offense committed while on release:

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to -

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. 3142(h) - Contents of release order

In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall -

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of -

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim,

or an informant), and 1513 (retaliating against a witness, victim, or an informant).

STATEMENT OF THE CASE

Petitioner Giacomo DiNorscio was one of eleven defendants accused in a six count indictment with charges arising from a conspiracy to distribute cocaine among several states during the period between September, 1985 and June, 1986. The district court had jurisdiction pursuant to 18 U.S.C. §3231. The trial was in Newark, New Jersey and resulted in the conviction of all defendants. The trial court sentenced petitioner to a 25 year prison term, a six year special parole term, and a $5,000 fine. It also added a consecutive five year term pursuant to 18 U.S.C. §3147.

Voir Dire

This case concerned allegations that petitioner Giacomo DiNorscio together with Manuel Monteiro, Gerald DeLuca, Thomas Marino, John Sinico, Frank Suppa, Vincent DiPasquale, Anthony Truglia, Gerald Cohen, Robert Fisher and Dick Pearson committed crimes in southern Florida and northern New Jersey.[1]

The trial took place in northern New Jersey.

The trial court included two questions in its voir dire designed to ferret out prejudice against Italian-Americans: "If you have any business or social contact with Italian-Americans, would such contact influence you

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[1] After the first week, the trial proceeded with only one non-Italian-American defendant, Cohen. Fisher agreed to be a government witness before trial and pled guilty on the fourth day of trial. Pearson left the trial at the end of the first week by pleading guilty.

either favorably or unfavorably against any Italian-American defendant?" "Is there anything about Italian-Americans which would cause you to hesitate to serve as a juror in this case?" These questions were asked to every potential juror.

During the selection of the petit jury the prosecution exercised eight peremptory challenges, five against Italian surnamed people: Carl Stiso, Donna Ferrante, Anthony Bitanso, Anthony Liosi, and Anthony Oranco. Immediately after the government's challenge of Mr. Oranco, defense counsel raised the issue that there was a pattern of discrimination against Italian-Americans in the jury selection process and requested that the government be instructed to cease such discrimination. The prosecutor responded by giving reasons for his challenge of Mr. Oranco and stating that he was unaware of whether the

other jurors challenged were Italian-Americans. Later that day, defense counsel cited the case of Batson v. Kentucky and requested the government's explanation for striking the other Italian-American jurors. The following morning the court stated that it had read the Batson decision and because counsel was pressing the application the court would read its opinion into the record during a recess. The next day, the court read its ruling into the record, denying the application. See p. 28a, infra.

In her order denying the application, the trial court started from the premise that Batson was limited to blacks and denied the application on the basis that petitioner was challenging the government's peremptory strikes of Italian-Americans. The court then set forth an alternate holding: even if Batson applied to Italian-Americans, at least one

Italian-American was on the jury, the defense struck two Italian-Americans, and two of the government's peremptory strikes stood out in the court's mind and were justified. The trial court did not directly consider whether Italian-Americans were a cognizable group. She did however state a difficulty in determining Italian-American ancestry based strictly on the use of surnames.

On appeal to the Third Circuit, petitioner argued that the prosecutor's use of peremptory challenges violated his right to equal protection as set forth in Batson v. Kentucky, 476 U.S. 79 (1986). United States v. DiPasquale, 864 F.2d 271, 275-77 (3d Cir. 1988). The appellate court affirmed the trial court. It found no reversible error in denying a Batson hearing. Id. at 276. In doing so, the Third Circuit declined to decide whether Batson applied to other ethnic or

racial groups. Id. 276-77. Rather, the appellate court assumed it did and focused on whether petitioner satisfied his burden to establish that Italian-Americans were a cognizable racial group. Id. at 277. The Third Circuit identified the requisite showing of cognizability as follows: "under Batson, DiNorscio was required to show that persons with Italian surnames...constitute a group that has been singled out for differential treatment and has been disparately represented on juries in New Jersey." Id. (emphasis supplied). The court found no such proof. Specifically, the appellate court underscored: "He has not made a showing that this group has been systematically excluded from jury service in New Jersey..." Id. In addition, the Third Circuit found most significant that there was no demonstration of actual prejudice since the jury, as seated, included two jurors with

Italian surnames. Id.

Sentencing

At sentencing, the trial court imposed a five year consecutive prison term pursuant to 18 U.S.C. §3147. Petitioner was not indicted, tried nor convicted of a §3147 offense. Further, he was not notified by the court or the government prior to the day of sentencing that the government sought, or that the court was considering, imposition of a sentence under §3147. Defense counsel immediately objected to the sentence as illegal and, pursuant to the direction of the court, filed a motion to vacate the sentence. The day after this motion was filed, petitioner filed his notice of appeal. The motion was never ruled upon.

On appeal, petitioner raised two §3147 issues: (1) the section establishes a

separate criminal offense, and (2) petitioner received inadequate notice that he was subject to a penalty under §3147.[2] DiPasquale, 864 F.2d at 279-81.

The court of appeals below affirmed the sentence holding that the satisfaction of the notice provisions of §3142(h) is not a precondition to a sentence pursuant to §3147. Id. at 280-81. In reaching this result, the Third Circuit specifically discussed and rejected the opposite conclusion of the Fourth Circuit in United States v. Cooper, 827 F.2d 991 (4th Cir. 1987). Id.

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[2] In the face of a government challenge of the propriety of petitioner's appeal on this issue due to a claimed lack of preservation at the trial level, the Third Circuit found the appeal proper. DiPasquale, 864 F.2d at 279 n.12.

REASONS FOR GRANTING PETITION

I

Batson

The decision below highlights the need for fuller standards on the applicability of non-black groups under Batson. Lower courts are reaching conflicting conclusions via different standards. The decision below adds to the confusion in the area and conflicts with the principles announced by this Court in Batson.

It is self-evident that America consists of numerous ethnic and racial groups; we are a melting pot where many of the newer ingredients are largely unmelted. Discrimination against many of these groups also is a hard fact of life and history in this land. It is in this context that petitioner urges this Court to settle the growing sea of confusion in the identification of cognizable groups under Batson v. Kentucky, 475 U.S. 79 (1986). Trial courts, both state and federal, badly need the guidance of this

Court. A clear delineation of standards in determining the applicability of Batson to the numerous ethnic and racial groups across this country would greatly facilitate the administration of criminal justice in the United States.

To compound the situation, the court of appeals below pronounced standards which directly conflict with the principles announced by this Court in Batson. The analysis is simply wrong. Worse, it effectively limits Batson in the Third Circuit to blacks by imposing standards even harsher than those in the decision overturned in Batson, Swain v. Alabama, 380 U.S. 202 (1965).

Almost three years ago, this Court in Batson articulated three elements necessary for a criminal defendant to establish a prima facie case for the denial of equal protection by the discriminatory use of peremptory

challenges during jury selection. Perhaps the most troubling and growing area of litigation following Batson centers on the identification and proof of a cognizable racial group. Does Batson apply to non-black ethnic groups such as Italian-Americans? If so, what proof is necessary to establish the cognizability of the group, the defendant's membership in the group, and the venireman's membership in the group? What is the standard to determine cognizability and membership during the jury selection process?

The circuits, but not the district courts, have sidestepped the applicability of Batson to non-black groups by generally assuming applicability. The First Circuit and now, in this case, the Third Circuit have erected impressive standards of proof to establish the cognizability of non-black groups. This is contrary to the reasoning and

holding of Batson. The Third Circuit now requires a defendant to show that the claimed group has been disparately represented on juries in the jurisdiction.

Moreover, the Third and the Eleventh Circuits are now in conflict on another aspect of the Batson prima facie case. The Third requires a demonstration of actual prejudice once a member of one's group is seated. The Eleventh, on the other hand, finds an equal protection violation for the improper striking of a single juror regardless of the seating of others of the same group.

Cognizability of Italian-Americans in New Jersey

The trial court held that Batson applied only to blacks. The Third Circuit declined to consider the correctness of that ruling and instead focused on whether Italian-Americans

were a cognizable group for Batson purposes.

The question of cognizability of Italian-Americans as a group for a Batson claim has now been decided in three circuits with different results. Compare United States v. DiPasquale, 864 F.2d 271, 275-77 (3d Cir. 1988) and United States v. Sgro, 816 F.2d 30, 32-33 (1st Cir. 1987), cert. denied, 108 S.Ct. 1021 (1988) with United States v. Biaggi, 673 F.Supp. 96, 99-103 (E.D.N.Y. 1987), aff'd, 853 F.2d 89, 95-96 (2d Cir. 1988), cert. denied, 109 S.Ct. 1312 (1989).

The circuits affirming findings of no Batson cognizability for Italian-Americans have required defendants to satisfy up to four evidentiary tests during voir dire: 1) that Italian-Americans have been or are subjected to discriminatory treatment outside of the

jury selection process;[3] 2) that Italian-Americans meet the cultural cohesion standards for class cognizability under the Sixth Amendment;[4] 3) that there is a meaningful relationship between surnames and ethnicity;[5] and 4) that Italian-Americans must have been systematically excluded from jury service in the district.[6]

In sharp contrast, Batson cognizability has been accepted, without the introduction of

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[3] United States v. DiPasquale, 864 F.2d at 277; United States v. Angiulo, 847 F.2d 956, 984 (1st Cir.), cert. denied, 109 S.Ct. 138 (1988); United States v. Bucci, 839 F.2d 825, 833 (1st Cir.), cert. denied, 109 S.Ct. 117 (1988).

[4] DiPasquale 864 F.2d at 277; United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987), cert. denied, 108 S.Ct. 1021 (1988).

[5] DiPasquale, 864 F.2d at 277; Bucci, 839 F.2d at 832; Sgro, 816 F.2d at 33.

[6] DiPasquale, 864 F.2d at 277.

evidence, as to Italian-Americans,[7] Hispanics,[8] Native Americans[9] and whites in the Virgin Islands.[10]

The area is badly in need of the Court's guidance.

To raise a Batson claim, a defendant "must show that he is a member of a cognizable racial group..." Batson, 476 U.S. at 96. This Court identified Castaneda v. Partida, 430 U.S. 482 (1977), as the case to which litigants should look for guidance on

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[7] United States v. Biaggi, 673 F.Supp. 96 (E.D.N.Y. 1987), aff'd, 853 F.2d 89 (2d Cir. 1988), cert. denied, 109 S.Ct. 1312 (1989).

[8] United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1987).

[9] United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987), cert. pending (petition filed August 8, 1988).

[10] Government of the Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. (V.I.) 1989).

determining cognizability. Id. In Castaneda, this Court relied on Hernandez v. Texas, 347 U.S. 475, 479 (1954), which held that Mexican-Americans are an identifiable class. In Hernandez, the Court rejected the notion that only two "racial" groups, white and black, are deserving of equal protection. Instead, the Court concluded "[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." Hernandez, 347 U.S. at 479.

The same analysis can be made of Italian-Americans. The shared ancestry of Italian-Americans is easily identifiable in their Italian surnames, just as Mexican ancestry was found by this Court to be readily apparent from surnames alone. Biaggi, 673 F.Supp. at 102, citing Castaneda, 430 U.S. at 495.

In Hernandez, the Court found Mexican-Americans to be a distinct class in part because the "attitude of the community" was to distinguish them from whites in general. 347 U.S. at 479, 74 S.Ct. at 671. Similarly, the trial court in this case repeatedly asked two voir dire questions which clearly demonstrated a perception Italian-Americans were identifiable and distinguishable from the community at large.

A defendant claiming to be a member of a cognizable group such as Italian-Americans must demonstrate a relationship between surnames and ethnicity. However, the issue of what type of showing is necessary has drawn two very different conclusions. The First and Third Circuits have required that a defendant present evidence demonstrating the link between surnames and ethnicity. The district court in Biaggi took judicial notice of the

cognizability of Italian-Americans and of their commonly identifiable names. Biaggi, 673 F.Supp. at 100-101. More significantly, this Court took judicial notice that Spanish surnames are easily identifiable and did not require any evidence to show that the individuals excluded from service on the grand jury were in fact Mexican-American when it appeared from their names that they were Mexican-American. Castaneda v. Partida, 430 U.S. at 494-95.

Judicial notice is appropriate for a cognizability determination because of the timing of this issue at trial. When a grand jury challenge is contemplated based on a repeated history of statistical underrepresentation, the discrimination is known to the defense in advance of trial. However, in a peremptory challenge situation the defense only sees evidence of governmental

discrimination during voir dire. To require the defense to prepare for a possible Batson challenge on the basis of ethnic ancestry in advance of trial, by gathering experts and census reports, would require the defense to always assume that the government will act in bad faith and discriminate against Italian-Americans through the use of its peremptory challenges. Courts presume that the government acts in good faith. United States v. Saade, 652 F.2d 1126, 1135 (1st Cir. 1981) (selective prosecution claim). Citizens in this county should be able to assume their government will act lawfully and in good faith.

If this Court concludes that some history of discrimination must be demonstrated by defendant as part of the proof of a cognizable racial group under Batson, it can be found with respect to Italian-Americans by judicial

notice as easily as can the relationship between surnames and Italian-American ethnicity. The district court in Biaggi took judicial notice that Italians have been the subject of stereotyping, invidious ethnic humor and discrimination.[11] See also Batson, 476 U.S. at 104 n.3 (Marshall, J., concurring) (noting a jury selection treatise circulated in a prosecutor's office which instructed:

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[11] Biaggi, 673 F.Supp. at 101. The district court in Biaggi then cited the following authority: "See Snell v. Suffolk County, 611 F.Supp. 521 (E.D.N.Y. 1985), aff'd, 782 F.2d 1094 (2d Cir. 1986). See also Regents of the University of California v. Bakke, 438 U.S. 265, 292 & n. 32...(1978) (Opinion of the Court per Powell, J.) ("'...Italians...continue to be excluded from executive, middle management, and other job levels because of discrimination based on their religion and/or national origin.' 41 C.F.R. §60-50.1(b)(1977)"); Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 235 (5th Cir. 1977) (Wisdom, J., dissenting) (noting that "Americans of Irish, Italian, Jewish [and] German extraction" have been subjected to "undoubted past societal discrimination")." Id.

"Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.")

The Third Circuit below, relying on United States v. Sgro, supra, ignored this Court's repeated references in Batson to Castaneda v. Partida and adopted a Sixth Amendment cognizability test found in Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc), cert. denied, 475 U.S. 1050 (1986). Borrowing the Sixth Amendment criteria is suspect, however, because this Court "quite clearly commanded that Castaneda govern its own use of the term 'cognizable racial group.'" Biaggi, 673 F.Supp. at 100 (citation omitted).

These Sixth Amendment standards are inapplicable because discrimination in the composition of the venire may be demonstrated by mere statistical underrepresentation of the

subject group, whereas violations of the equal protection clause by discrimination in the use of peremptory challenges require a showing of discriminatory purpose. Id. "Because the guarantee against discrimination through peremptory challenges requires a showing of purpose, 'cognizable racial groups' may be defined less rigidly, for it is precisely the evidence of intentional exclusion of the group that helps to identify the group." Id.[12]

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[12] The distinction between the necessity of showing discriminatory purpose and the use of statistical underrepresentation to show discrimination was also discussed in Barber v. Ponte, 772 F.2d at 999-1000: "That is not to say, however, that if a classification were specifically and systematically excluded from jury duty the same standard would be used as here, where defendant simply relies on a statistically [sic] disparity in the venires to challenge its constitutionality. If certain people are specifically and systematically excluded from jury duty, then the jury-administrating authority would have created its own group." Id. (emphasis in original).

The use by the Third Circuit of the Sixth Amendment criteria moves from suspect to plainly wrong when the rationale for the fair cross section requirement is compared to the Batson rationale. The goal of the fair cross section requirement is to accommodate the attitudes, values, ideas and experience of the eligible citizens that compose the community where the case is tried. Barber v. Ponte, 772 F.2d at 997. Under the fair cross section analysis, a group must be distinctive in terms of common attitudes and experience. Id. Otherwise, its absence from the jury would not show the application of community values. Indeed, it is so important that distinctive group views be represented in the composition of the jury that any defendant, even one not a member of the absent or underrepresented group, may raise a Sixth Amendment claim.

Conversely, to raise a Batson claim the defendant must be of the same race as the jurors peremptorily struck by the government. Batson, 476 U.S. at 96. Under Batson, the focus is on the government's use of peremptory challenges to discriminate against members of the defendant's racial or ethnic group. Batson seeks to end the use of a presumption that a juror will be biased in favor of a defendant of his own racial or ethnic group. Batson's cognizable group analysis, based as it is on purposeful discrimination, shares nothing with the basis for and selection of a distinctive group under fair cross section analysis.

To exacerbate the situation, the Third Circuit below reads a suggested method of proving discrimination as mandatory for Batson purposes. The word "may" is transformed into "must." DiPasquale, 864 F.2d at 277. In the

Third Circuit, to establish the cognizability of a non-black group, therefore, a defendant must establish that the group "has been systematically excluded from jury service" in the jurisdiction. Id.

Like the crippling burden of proof imposed by Swain, if this remains the standard for determination of cognizability of groups under Batson, discriminatory challenges of members of these non-black groups will be largely immune from constitutional scrutiny.

Actual prejudice

After the below decision, the circuits are in conflict is whether it is possible to make a prima facie showing of discrimination under Batson if members of the cognizable group serve as jurors. Both the trial court and the circuit court in this case placed emphasis on the fact that the prosecution did not strike every Italian-American on the

panel. As stated below, "[p]erhaps most significantly, [petitioner] does not demonstrate the actual prejudice to him in the constitution of his jury, which included two jurors who have Italian surnames." DiPasquale, 864 F.2d at 277 (emphasis in original).

The mere existence of two jurors from the defendant's cognizable group on the jury cannot insulate the government's discriminatory use of peremptory challenges. This Court stated clearly that a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions. Batson, 476 U.S. at 95 citing Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977). Indeed, the holding of Batson is an elimination of the pattern requirement of

Swain v. Alabama.

As correctly held by the Eleventh Circuit: "[T]he striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated and when there are valid reasons for the striking of some black jurors." United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987), vacated in part on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 109 S.Ct. 28 (1988); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). Cf. United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) (existence of blacks on jury precludes an inference of discrimination when prosecutor had remaining challenges).

The importance of the meaning and operation of Batson is national in scope. The decision below adds to the confusion in the

area and conflicts with the principles announced by this Court in Batson. The area needs the authoritative voice of this Court.

II

§3147 Sentence

The decision in the court of appeals below created a direct conflict with two other circuits. The conflict involves an important and common issue - the notice requirement under The Bail Reform Act of 1984 as a precondition to additional punishment for the commission of a crime while on bail.

The decision below created a direct conflict in the circuits. The Third Circuit now holds that The Bail Reform Act of 1984 does not require notice at the time of a defendant's release that he is subject to an additional, mandatory prison term for any offense committed while on release as a precondition to a §3147 sentence. DiPasquale, 864 F.2d at 280-281.

The Fourth and the Seventh Circuits hold directly the opposite. United States v. Cooper, 827 F.2d 991, 994 (4th Cir. 1987) ("Congress did not intend §3147 to apply when the notice requirements of §3142 were not fulfilled."); United States v. DiCaro, 852 F.2d 259, 264-65 (7th Cir. 1988) ("We agree with the Fourth Circuit's decision in United States v. Cooper...that The Bail Reform Act itself precludes the sentencing under §3147 of a person who was not advised at the time of release of the penalties for committing an offense while released on bond.") In addition, two judges of the Eighth Circuit also have written in support of the Cooper decision. United States v. Sink, 851 F.2d 1120, 1122 (8th Cir. 1988), cert. denied, 109 S.Ct. 800 (1989) (Heaney, J., concurring, joined by Lay, C.J.) ("[F]or the penalty to be imposed, it must...be shown that before the

defendant was released, he...had actual notice of the penalty provision of section 3147.")

The federal trial courts across this nation conduct bail hearings and release defendants daily. An unfortunate percentage of those released commit additional offenses while on bail. Congress passed The Bail Reform Act of 1984, in part, to provide additional prison penalties for those people who commit crimes while released on bail. Now there is confusion over the release notice provision which directly impacts on the applicability of the punishment provision. Two circuits have ruled one way. A third now has ruled the other. The circuits disagree over the statutory construction of this important provision of The Bail Reform Act of 1984. This Court's review is essential to resolve this conflict regarding the proper construction of a widely used Congressional

act.

CONCLUSION

The decision below adds to the confusion concerning the applicability of non-black groups under Batson and conflicts with this Court's principles in Batson. The decision below also creates a direct conflict with other circuits concerning the proper construction of important provisions of The Bail Reform Act of 1984. For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5810, 86-5835, 86-5836, 86-5841
86-5875, 86-5886, 87-5284, 87-5285,
87-5286, 87-5288 & 87-5317

UNITED STATES OF AMERICA

v.

VINCENT DI PASQUALE,
Appellant in 86-5810

UNITED STATES OF AMERICA

v.

DI NORSCIO, GIACOMO,
Appellant in 86-5835 & 87-5284

UNITED STATES OF AMERICA

v.

COHEN, GERALD,
Appellant in 86-5841 & 87-5285

UNITED STATES OF AMERICA

v.

DELUCA, GERALD,
Appellant in 86-5836 & 87-5286

UNITED STATES OF AMERICA

v.

SINICO, JOHN,
Appellant in 86-5875 & 87-5288

UNITED STATES OF AMERICA

v.

TRUGLIA, ANTHONY,
Appellant in 86-5886 & 87-5317

On Appeal from the United States District Court
for the District of New Jersey - Newark
(D.C. Criminal Nos. 86-223-9, 86-223-01, 86-223-02,
86-223-05, 86-223, 86-223-10)

Argued January 11, 1988

Before: HIGGINBOTHAM and BECKER, *Circuit Judges,*
and SHAPIRO, *District Judge.**

(Filed December 23, 1988)

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* Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

These consolidated appeals are brought by six co-defendants from judgments of conviction and

sentence on charges arising from a conspiracy to distribute narcotics. Appellants Giacomo Di Norscio, Gerald Cohen, Gerald Deluca, John Sinico, Anthony Truglia and Vincent Di Pasquale, assert several and various contentions of error in the district court's conduct of their trial and imposition of sentence. They assert, *inter alia*, that the district court erred by refusing to grant a motion for an evidentiary hearing to determine whether the government had impermissibly utilized its peremptory challenges during *voir dire* to exclude a cognizable ethnic group; that the district court erred by refusing to grant a motion for recusal; that the district court erred by its imposition of an enhanced sentence pursuant to the federal statute that provides for increased penalties for persons convicted of an offense committed while on bail for a separate offense; and finally, that the district court erred by refusing to dismiss the indictment because the charging grand jury did not fairly represent a cross-section of the community.[1] We find each of these

1. Appellants seek relief from their convictions on a host of other grounds as well. On the claim of ineffective assistance of counsel raised by Sinico, we will adhere to this Court's prior holdings that such claims are not properly interposed on direct appeal, but should be raised in appropriate collateral proceedings. *See, e.g.*, United States v. Gambino, 788 F.2d 938 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 98 (1986).

Appellants contend that the verdict was affected by juror taint, that the district court erred by failing to grant a motion for severance and by improperly denying the request for a jury charges regarding the alleged existence of multiple conspiracies, that the government's closing summation unfairly prejudiced the jury and that the verdict was contrary to the weight of the evidence. Di Norscio claims that the district court erred by refusing to dismiss the indictment against him for prosecutorial misconduct and that his prosecution violated his double jeopardy rights. He and DeLuca allege that the district court improperly denied them the opportunity to present a complete defense by erroneously excluding evidence, restricting cross-examination and limiting their opening

contentions without merit and, accordingly, we will affirm the district court's judgments of conviction and sentence.[2]

I.

Background

Appellants were charged, in a six-count indictment returned in June 1986, with participation in a conspiracy to distribute cocaine between several states during the period between September 1985 and June 1986. Specifically, the indictment alleged that the appellants, together with five co-defendants[3], conspired to distribute cocaine from a base in Florida to New Jersey and several other states; possessed and

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and closing arguments to the jury. DeLuca and Di Pasquale contend that the district court considered improper factors in its determination of sentence and Di Pasquale contends that his prosecution was improper because it violated the government's "Petite" policy of not prosecuting persons who have previously been prosecuted in a state proceeding for the same acts that are the basis of the federal prosecution. Truglia contends that the district court erred by denying his request for a jury instruction that one of the criminal acts charged to him was an independent act not in furtherance of the charged conspiracy and by denying his motion for a judgment of acquittal. We have evaluated all of these claims and find them to be plainly without merit and not warranting discussion.

2. Pursuant to Fed. R. App. P. 28(i), each appellant has adopted arguments raised by other appellants to the extent that those arguments apply to him. For convenience and clarity, our discussion of the appellants' contentions makes reference only to one of the named appellants. We have, however, considered the merit of each argument to each appellant whose conviction and sentence is implicated and, in that light, we reach our decision to affirm.

3. These individuals: Frank Suppa, Manuel Monteiro, Thomas Marino, Dick Pearson and Robert Fisher each pleaded guilty to the charges prior to the commencement of the trial.

aided and abetted the possession of cocaine with the intent to distribute it; and that, in pursuit of the conspiracy, two of the appellants -- Di Norscio and Cohen -- engaged in a continuing criminal enterprise as the principal administrators and organizers of the illicit conspiracy. The principal evidence of the conspiracy was presented through the testimony of three witnesses: William Hawley, Gregory Hamilton, and Robert Fisher, each of whom observed and participated in some aspects of the illegal transactions.[4]

The trial of these charges commenced in September 1986 and resulted in the conviction of each appellant for participation in the conspiracy and for possession with the intent to distribute cocaine in

4. Hawley, (who changed his name to "Jay Richmond"), testified that he was a regular occupant at Di Norscio's home in Florida and at Truglia's home in Florida from September through December, 1985. During that time he witnessed cocaine transactions three or four times a week at either Truglia's home or at Di Norscio's home and observed DeLuca and Sinico working for Di Norscio and Truglia as "runners" who picked up drugs in Florida for delivery to New Jersey, New York, Rhode Island and Tennessee. Hawley also testified that he was often with Di Norscio and Truglia while they counted the proceeds from these drug transactions. *See* Joint Appendix to the Briefs of Defendants-Appellants ("Appellants' App.") at 207-09.

Hamilton testified that he purchased cocaine on a regular basis from Di Norscio and Cohen. Hamilton had been arrested in Tennessee for the sale of cocaine to undercover drug enforcement agents. He testified that the cocaine in his possession in Tennessee at the time of his arrest was part of a shipment that he had received from DiPasquale who had delivered it to him on behalf of Di Norscio from Florida. *See* Appellants' App. at 1439-41.

Fisher, who was indicted with the appellants, testified that he too regularly purchased cocaine from Di Norscio and Cohen. He testified that he delivered cocaine payments to DeLuca in New Jersey, and to Di Norscio and Cohen in Florida. He also testified that he had received cocaine from Di Norscio and Cohen for distribution in Rhode Island. *See* Appellants' App. at 1067-71, 1168-70.

violation of 21 U.S.C. § 846 (1982).[5] Additionally, the jury found Di Norscio and Cohen guilty of the continuing criminal enterprise charge, which involved felony violations of subchapters I and II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848 (Supp. IV 1986)[6], and

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5. Under § 846, it is unlawful for "(a)ny person [to] attempt[] or conspire[] to commit any offense defined in this subchapter." 21 U.S.C. § 846 (1982).

Each of the defendants except Di Pasquale was tried by a jury on these counts and convicted pursuant to the jury's verdicts. Di Pasquale entered a plea of guilty to the offenses with which he was charged.

6. Section 848(b) provides, in pertinent part, that

> [a]ny person who engages in a continuing criminal enterprise [CCE] shall be imprisoned for life and fined . . . if -
>
> > (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders[,]

21 U.S.C. § 848(b)(Supp. IV 1986), and the enterprise involves a quantity of drugs or sum of money that exceeds a delineated amount.

Section 848(d) states that

> [a] person is involved in a CCE if:
>
> > (1) he [or she] violates any [felony] provision of this subchapter or subchapter II of this chapter . . . and
> >
> > (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -
> >
> > > (A) . . . undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

found Di Norscio and De Luca guilty of possession with the intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1)(1982).[7]

Pursuant to these verdicts, the district court sentenced Di Norscio to two concurrent twenty-five year prison terms, a six year special parole term, and a $5,000 fine. It also imposed a consecutive five year term pursuant to 18 U.S.C. § 3147 (Supp. IV 1986)("§ 3147").[8] The district court sentenced Cohen to a twenty-five year prison term and to a consecutive five year term under § 3147. DeLuca was sentenced to concurrent terms of seventeen and ten years and to a three year special parole term. He was also sentenced to a consecutive term, under § 3147, of three years. The district court sentenced Sinico to a seven year prison term, Truglia to a ten year prison term and DiPasquale to a fifteen year prison term, to be served concurrently

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(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(d)(Supp. IV 1986).

7. Section 841(a)(1) makes it unlawful:

> to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841(a)(1)(1982).

8. Section 3147 provides that

> [a] person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to -
>
> > (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony

18 U.S.C. § 3147 (Supp. IV 1986). The statute further provides that the "term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment." *Id.*

with a term that he was serving as the result of a prior conviction.

Following the entry of judgments of convictions and sentences, the appellants timely filed notices of appeal alleging error in the conduct of their trial. They assert: (1) that the government improperly exercised its peremptory challenges to exclude Italian-Americans from the petit jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) that the district court erred by failing to grant a motion for recusal pursuant to 28 U.S.C. § 455(a), (b)(1), and (b)(3)(1982); (3) that the district court improperly enhanced their sentences under § 3147; and (4) that the grand jury selection process systematically excluded Blacks, Hispanic-Americans and persons with less than high school educations, in violation of the sixth and fourteenth amendments and the Jury Selection and Service Act of 1968, ("Jury Selection Act"), 28 U.S.C. § 1861 *et seq.* (1982). We have reviewed these contentions and find none of them sufficient to warrant intrusion upon the judgments of the district court. We will, therefore, affirm.

II.

Exclusion of Italian-Americans From the Petit Jury

Di Norscio contends that, during the selection of the jury, the government exercised five peremptory challenges against venire persons with Italian surnames for the purpose of excluding Italian-Americans from the jury. Di Norscio argues that the government's use of peremptory challenges in that manner violated his right to equal protection, as set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). Di Norscio moved for a hearing under *Batson* to require the government to put forward a "neutral explanation," *id.* at 97, for challenging the jurors and the district court reserved judgment on the motion pending the

completion of the *voir dire*. The jury selection process was completed resulting in the selection of two jurors who had Italian surnames.

Immediately following the jury selection, the district court denied Di Norscio's application for a *Batson* hearing. It concluded that the *Batson* rule is explicitly limited to racial discrimination against blacks and, thus, did not extend to Italian-Americans. *United States v. Di Norscio, et al.*, No. 86-223, Trans. of Proceedings (Opinion) at 271 (D.N.J. Sept. 11, 1986), *reprinted in* Appellants' App. at 271. Significantly, however, it found regarding two of the challenged jurors, that permissible grounds for exclusion existed, and concluded that even if it read *Batson* to extend beyond black Americans, Di Norscio had not made the requisite factual showing of the *cognizability* of the group that he alleges to have been excluded, or that *any* group was actually excluded. The district court stated its finding that "[Di Norscio's] application [for a *Batson* hearing] is bottomed on nothing -- on utterly nothing either factual or legal." *Id.* at 274.

We need not consider the correctness of the district court's determination that the rule of *Batson* is not applicable to cognizable racial or ethnic groups other than black Americans under any circumstances because we conclude that the district court's decision not to exercise its discretion and order a *Batson* hearing -- on the facts of this case -- did not constitute reversible error.[9] Accordingly, we will not disturb the

9. We note that several federal appellate courts have assumed that *Batson* has applicability to racial or ethnic groups other than black Americans. *See e.g.*, United States v. Alcantar, 832 F.2d 1175, 1180 (9th Cir. 1987)(applying *Batson* to a challenge that Hispanic-Americans were improperly excluded from jury service); United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987)(applying *Batson* to a challenge that Native Americans were

district court's judgment.[10]

Under *Batson*, to establish a *prima facie* case of purposeful discrimination in the selection of the petit jury, a

> defendant must first show that he [or she] is a member of a cognizable racial group, *Castaneda v. Partida*, . . . [430 U.S.] at 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the

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improperly excluded from jury service). *Cf.* Roman v. Abrams, 822 F.2d 214, 227 (2d Cir. 1987)(under the Sixth Amendment, whites are a cognizable group for *Batson* analysis), *petition for cert. filed*, (U.S. Dec. 12, 1987)(No. 87-6031). Indeed, two federal appellate courts have considered the applicability of *Batson* to Italian-Americans. *See* United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987)("[w]e assume without deciding that the principles of *Batson* would extend to ethnic as well as racial constituencies"), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1021 (1988); United States v. Bucci, 839 F.2d 825, 833 (1st Cir. 1988)("[w]hether Italian-Americans comprise a group needing 'protection' from 'community prejudices' is a question of fact"); United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988) *aff'g* United States v. Biaggi, 673 F. Supp. 96, 102 (E.D.N.Y. 1987) ("It can therefore be confidently concluded that the Court in *Batson* meant 'cognizable racial groups' to include a variety of ethnic and ancestral groups subject to intentional discrimination, including Italian-Americans."). In each of these decisions, the appellate court concluded that, even if *Batson* is not *per se* limited to black Americans or to race, the defendant failed to make the requisite factual showing of the cognizability of Italian-Americans or persons with Italian surnames to merit relief under *Batson*. We reach the same result in this case.

10. While Judge Becker agrees with the discussion in this section of the opinion, he would pretermit it in view of his agreement with the district court that the *Batson* rule is limited to discrimination against members of cognizable racial groups. *See Brown v. North Carolina*, ___ U.S. ___, 107 S.Ct. 423, 424 (1986) (O'Connor, J. concurring in the denial of certiorari) (*Batson* "is a product of the unique history of racial discrimination in this country; it should not be divorced from that context.")

> defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S., at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire[persons] from the petit jury on account of their race.

Batson, 476 U.S. at 96. We assume *arguendo* that the holding of *Batson* is not limited to black Americans, and applies to any ethnic or racial group that meets the criteria of cognizability delineated by the Supreme Court. In that light, we note that

> [t]he defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment . . . a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time.

Id. at 94 (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)). In the present case, therefore, under *Batson*, Di Norscio was required to show that persons with Italian surnames -- the group that he has identified as impermissibly excluded from his jury -- constitute a group that has been singled out for differential treatment *and* has been disparately represented on juries in New Jersey.

In our evaluation of factors that must be shown in order to demonstrate the cognizability of a racial or ethnic group, we take some guidance from a decision of the Court of Appeals for the First Circuit. In *United States v. Sgro*, 816 F.2d 30 (1st Cir. 1987), *cert.*

denied, ___ U.S. ___, 108 S.Ct. 1021 (1988), that appellate court noted that:

> [t]he proponent must prove that (1) the group must be definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences must run through the group, and (3) there must exist a community of interests among the members, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.

Sgro, 816 F.2d at 33. We refer to these factors to illustrate the nature of the showing required of Di Norscio and the insufficiency of the proof presented by him on the question of cognizability. Di Norscio offered no evidence from which the district court could reasonably have found that persons with Italian surnames are reliably identified as members of a single ethnic descent, or that persons with such surnames "either have been or are currently subjected to discriminatory treatment," *United States v. Bucci*, 839 F.2d 825, 833 (1st Cir. 1988). *See also, United States v. Angiulo*, 847 F.2d 956, 984 (1st Cir. 1988). Indeed, during *voir dire*, Di Norscio himself conceded that "it's impossible to tell by the names" which jurors are Italian-Americans. Appellants' App. at 3540. Significantly, he presented no evidence, other than the surnames, to establish the ethnicity of the challenged jurors. During Di Norscio's oral motion for a *Batson* hearing, the district court stated it's belief that "the record also would reflect that no one here knows whether these people are truly Italian-Americans or not, and [that] it's speculation at best on behalf of defense counsel." Appellants' App. at 3543.

Moreover, Di Norscio has not demonstrated that persons with Italian surnames -- even if they do not

share Italian descent -- are themselves an identifiable ethnic group that shares common backgrounds and ideas linked to a single culture and group loyalties, or that there exists among them a community of interests "such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process." *Sgro* 816 F.2d at 33. He has not made a showing that this group has been systematically excluded from jury service in New Jersey and, perhaps most significantly, he does not demonstrate the *actual* prejudice to him in the constitution of his jury, which included *two* jurors who have Italian surnames. For these reasons, we conclude that Di Norscio has failed to carry his burden of demonstrating that a cognizable group for *Batson* purposes was impermissibly excluded from his jury and, therefore, we conclude that he has failed to establish a *prima facie* case of discrimination in the government's use of its peremptory challenges.

III.

Denial of the Motion for Recusal

At the time the indictment underlying this appeal was returned, Di Norscio was awaiting trial on a separate criminal indictment, also returned in the District Court for New Jersey, in *United States v. Accetturo*. One count of the indictment in *Accetturo* charged Di Norscio with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and § 841 (a)(1) (1982). The conspiracy charged in that case was alleged to have existed between September 1982 and July 1985. After his arrest in *Accetturo*, Di Norscio was released on bail. During the period of that release, Di Norscio was indicted in the instant case. Di Norscio contends that the interrelationship between these prosecutions mandated recusal by the trial judge

under 28 U.S.C. § § 455(a), (b)(1) and (b)(3)(1982).[11] He contends that the *Di Norscio* and *Accetturo* cases were actually separate prosecutions of a single conspiracy and, because the district judge in the present case served in the United States Attorney's office during the time that the *Accetturo* investigation was in progress, it was improper for her to preside over the trial of the case underlying this appeal.

Judge Barry denied all defense motions to recuse, on the grounds that: (1) the conspiracy charged in the case before her and the conspiracy charged in the *Accetturo* case were separate conspiracies; (2) she had no previous knowledge of the *Di Norscio* case and had never been involved in any aspect of the prosecution of this case while she was in the U.S. Attorney's office and; (3) she had no actual bias against the defendants and no reasonable person would question her impartiality. We review the district court's decision not to grant the motion for recusal for abuse of discretion, *see United States v. Dalfonso*, 707 F.2d 757, 760 (3d Cir. 1983), and we will affirm.

Di Norscio contends that recusal was necessary because Judge Barry served as a Supervisory Assistant U.S. Attorney in the District of New Jersey through November 1983. Di Norscio argues that recusal was mandated by 28 U.S.C. § 455(b)(3), because the judge

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11. Pursuant to § 455(a), a judge must "disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1982). A judge must also disqualify himself or herself where he or she "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1)(1982). Finally, pursuant to § 455(b)(3) a judge is required to disqualify himself or herself if he or she "has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(1982).

"served in governmental employment and in such capacity participated as counsel, advisor or material witness . . . or expressed an opinion concerning the merits of the . . . case." Section 455(b)(3), however, mandates withdrawal only when "the judge is asked to hear the *same case* in which [he or she] has been of counsel. . . ." *In re Grand Jury Investigations*, 486 F.2d 1013, 1015 (3d Cir. 1973)(emphasis in original) *cert. denied sub nom. Testa v. United States*, 417 U.S. 919 (1974). In the present case, the district judge explicitly stated that she never participated as counsel or advisor, or expressed any opinion concerning Di Norscio's case. We note that the indictment in this case charges acts that began in September 1985, nearly two years after the Judge Barry left the U.S. Attorney's Office.

The district court found that the conspiracy charged in the *Accetturo* case terminated at the time of the appellants' indictments in that case in August 1985. It held, therefore, that the conspiracy underlying the indictment in the present case -- which alleged acts that succeeded the appellants' arrests in *Accetturo* -- was separate from the conspiracy underlying the indictment in *Accetturo*. We are not persuaded that that factual finding was clearly erroneous.

Even if we accepted Di Norscio's contention that the conspiracy charged in this case arises from the same factual circumstances as the conspiracy charged in *Accetturo*, however, recusal was not required under § 455(b)(3). Although, as Di Norscio asserts, the United States Attorney is "of counsel" in all criminal prosecutions within his or her district, *see e.g., In re Grand Jury Investigation*, 486 F.2d at 1015; *United States v. Vasilick*, 160 F.2d 631, 632 (3d Cir. 1947), Di Norscio offers no compelling argument for extending this *per se* "of counsel" rule to cover every judge who has previously worked as a *supervisory* attorney in the

U.S. Attorney's Office. In our view, absent a *specific* showing that that judge was previously involved with a case while in the U.S. Attorney's office that he or she is later assigned to preside over as a judge, § 455(b)(3) does not mandate recusal. In the present case, therefore, we decline to hold that the trial judge's position as a Supervisory Assistant U.S. Attorney made her "of counsel" in either the *Accetturo* prosecution or the present case. In light of that conclusion, and because there is no evidence that she otherwise participated in the investigation or the prosecution of the present case or of *Accetturo*, we hold that the trial judge did not abuse her discretion by denying the motion for recusal under § 455(b)(3).

Recusal was also not mandated under either § 455(a) § 455(b(1). Apart from the allegation concerning the trial judge's prior employment as Assistant U.S. Attorney, Di Norscio presents no evidence of bias, prejudice or improper motive that Judge Barry harbored with regard to Di Norscio's case. He does not offer evidence to refute the trial judge's statement that she had "no personal knowledge of any evidentiary facts concerning this case," Appellants' App. at 3262-63, nor did he offer any evidence tending to show that "a reasonable [person] knowing all the circumstances would harbor doubts concerning the judge's impartiality." *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987)(construing § 455 (a)). As we have discussed above, he has not shown that the district judge had prior involvement in the prosecution of his case, or that she had any improper connection with the defendants, prosecutors, witnesses or any one else involved with this trial. On this record, we are not persuaded that trial judge's impartiality was in doubt and, therefore, we find no abuse of discretion in the denial of the motion to recuse.

IV.

Enhancement of Sentence Pursuant to § 3147

We next review the claim that Di Norscio was sentenced illegally under § 3147. Di Norscio claims that § 3147 establishes a criminal offense. He argues that, because he was not indicted, tried and convicted for that offense, he was not properly sentenced under the provision. Alternately, he contends that even if § 3147 is merely a sentence enhancement provision, the sentence that he received under it was nonetheless improper because he was not given adequate notice of the fact that he was subject to the enhanced penalty. Our standard of review of these issues of statutory construction is plenary. *See Chrysler Credit Corp. v. First Nat'l Bank and Trust Co.*, 746 F.2d 200, 202 (3d Cir. 1984). Pursuant to that standard, we will affirm the district court's imposition of sentence.[12]

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12. The government argues that Di Norscio did not preserve his right to appeal this sentence because he did not comply with the district judge's request for a written motion after sentencing. Di Norscio orally objected to the § 3147 sentence. He submitted the motion that the judge requested; it was received and filed but was not listed for argument by the clerk because of Di Norscio's failure to attach a proposed order. Di Norscio then filed this appeal and the motion was never ruled upon.

We treat the motion before the district court as one for reconsideration of the sentence that was not ruled upon by the district court. Di Norscio, however, is not appealing the disposition of that motion. Rather, he challenges the propriety of the *sentence* itself. "Final judgment in a criminal case means sentence. The sentence is the judgment." Berman v. United States, 302 U.S. 211, 212 (1937). Thus, although the district court never disposed of Di Norscio's motion, it did enter a final judgment of conviction and sentence and, from that judgment, Di Norscio's present appeal is proper.

A. *Section 3147 Does Not Create a Separate Offense*

In reaching our conclusion that § 3147 was intended only to enhance the punishments for other offenses, we are guided both by the plain language of the statute, which speaks clearly in terms of enhanced penalty -- "[a] person convicted of an offense committed while released under this chapter shall be sentenced, *in addition to the sentence prescribed for the offense*" 18 U.S.C. § 3147 (Supp. IV 1986) -- and by the legislative history of the provision, which reflects Congress's intent that the potential for enhanced punishment serve as a deterrent to the commission of crimes during bail release. The Senate Report of this provision noted that

> [s]ection 3147 is designed to deter those who would pose a risk to community safety by committing another offense when released under the provisions of this title and *to punish those who indeed are convicted of another offense*. This section enforces the self-evident requirement that any release ordered by the courts include a condition that the defendant not commit another crime while on release. Given the problem of crime committed by those on pretrial release this requirement needs enforcement. Accordingly, *this section prescribes a penalty in addition to any sentence ordered for the offense* for which the defendant was on release. This *additional penalty* is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony. If the offense committed while on release is a misdemeanor, this *additional penalty* is at least 90 days and not more than one year.

See S. Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3217

(emphases added). This passage refers to penalty only and to the fact that that penalty is "additional" to the sentence imposed for the substantive offense for which the defendant has been convicted. It gives no indication that Congress intended to create a separate criminal offense by its enactment of § 3147 and we have found no such intent evident elsewhere in the legislative history.

Our conclusion accords with a decision of the Court of Appeals for the Ninth Circuit in a case involving a claim identical to Di Norscio's. In *United States v. Patterson*, 820 F.2d 1524 (9th Cir. 1987), the appellate court held that

> [s]ection 3147 is a sentence enhancement statute which simply mandates an enhanced sentence for someone who commits an offense while released on bail. There is nothing exceptional about the statute, nor is it vague or ambiguous. The language is plain and the meaning is clear.

Patterson, 820 F.2d at 1526. *See also, United States v. Sink*, 851 F.2d 1120 (8th Cir. 1988)(Section 3147 merely enhances punishment for crime committed while on release, rather than creating separate crime that had to be presented to a grand jury and proven beyond reasonable doubt at trial); *United States v. Feldhacker*, 849 F.2d 293 (8th Cir. 1988)(same). We are similarly persuaded that § 3147 is a sentence enhancement provision and not a separate offense and, accordingly we will affirm the district court's judgment of sentence.

B. *Section 3147 Does Not Require Specific Notice*

Di Norscio also claims that he received inadequate notice that he was subject to penalty under § 3147. He did not claim, at his sentencing, that he was unaware that he was subject to this penalty, and raises this claim for the first time on appeal. We find this

contention without merit. We do not read the language or the legislative history of § 3147 as mandating explicit notice to a defendant of the possibility for sentence enhancement as a pre-condition to sentence and, accordingly, we will affirm the district court's judgment of sentence.

Di Norscio's argument on this issue relies upon a decision of the Court of Appeals for the Fourth Circuit. In *United States v. Cooper*, 827 F.2d 991 (4th Cir. 1987) the appellate court held that a defendant who was not specifically advised by the judicial officer who released him on bail that the defendant would be subject to enhanced penalty for committing an offense while on release could not be sentenced under § 3147. *Cooper* reasoned that § 3147 should be read in tandem with a provision of § 3142 of the Bail Act. *See* 18 U.S.C. § 3142(h) (Supp. IV 1986). Section 3142 regulates the conditions and circumstances of releases for defendants pending their trials. It requires that such conditions be set forth in a written statement to the defendant "in a manner sufficiently clear and specific to serve as a guide for [his or her] conduct." 18 U.S.C. § 3142(h)(1) (Supp. IV 1986). It also provides that the judicial officer who authorizes the release of a person under this statute advise that person of "the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release." 18 U.S.C. § 3142(h)(2)(A) (Supp. IV 1986). *Cooper* held that, because § 3142 explicitly mandates notice to a defendant of the punishment to which he or she would be subject for breaking the terms of release, a similar mandate should be read into § 3147. The court noted that "while Congress did not specify the effect on sentence enhancement of the failure to give such notice, its silence and the rule of lenity to be applied in construing ambiguous penal statutes lead to the conclusion that § 3147" could not be applied in the

absence of notice. *Cooper*, 827 F.2d at 994. We see no such ambiguities in the language of the provision and, accordingly, we reject the view reached by *Cooper*.

Cooper noted that the legislative history of § 3142 included particular reference to Congress's intent that the statute serve to deter recidivism. Consistent with that goal, as *Cooper* notes, the legislative history of § 3142(h) states that:

> [the judicial officer] is . . . required to advise the person [released on bail] of the penalties applicable to a violation of the conditions . . . . The purpose of such advice is solely to impress upon the person the seriousness of failing to appear when required.

S. Rep. No. 225 at 25, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3208, *see also Cooper*, 827 F.2d at 994. We do not, however, read this legislative history as broadly as did *Cooper*, to require that such notice be a prerequisite to punishment for violation of the statute. Moreover, we fail to see how such a reading could be consistent with Congress's intent. Indeed, the statements immediately succeeding the above quoted legislative history suggest precisely the opposite conclusion. In statements concerning the effect of § 3142(h)'s notice requirement on other provisions of the Bail Act, the Senate Report noted that "failure to render such advice is not a bar or defense to prosecution for bail jumping under § 3146 . . . [or] to a prosecution under the[] sections of title 18 designed to protect witnesses, victims and informants." Rather, "[t]he purpose of such advice *is solely to impress upon the person the seriousness of failing to appear when required.*" *Id.* (emphasis added).

Cooper interpreted the omission from the passage of legislative history quoted above of a specific reference to § 3147 -- in light of the specific references that that passage makes to other provisions of the act --

as indicative of Congress's intent that the notice requirement of 3142(h) serve as a prerequisite to the imposition of an enhanced sentence under § 3147 even though it explicitly does not serve as a bar to punishment for other violations. *See Cooper*, 827 F.2d at 995. In our view, this rationale reads too much into what was *not* said by the legislative history and reads too little of what *was* said by the statute itself. We find it too inconsistent with the overall scheme of the Bail Act to subscribe to the view that Congress intended that persons who commit the very crimes that the act intended to deter, should avoid punishment for those crimes because of the judicial officer's failure explicitly to remind the defendant of the consequences of his or her acts. *Cf. Feldhacker*, 849 F.2d at 299 (Section 3147 does not require written notice to the defendant of the government's intent to seek an enhanced sentence, "[i]t is a self-executing and mandatory provision of law, addressed by Congress to sentencing courts."). We will therefore affirm Di Norscio's sentence under § 3147. .

V.

Denial of Due Process In The Constitution Of The Grand Jury

Cohen argues that the grand jury that indicted him substantially underrepresented Blacks, Hispanic-Americans and persons with less than high school educations, in violation of his sixth amendment right to be tried by an "impartial jury."[13] Encompassed

13. Cohen also argues that the alleged underrepresentation violated his equal protection rights. The Fifth Amendment "forbid[s] discrimination that is so unjustifiable as to be violative of due process." Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975). Fifth amendment equal protection claims are approached in the same way as fourteenth amendment claims. *Id.* We find that Cohen lacks standing to assert an equal protection violation.

within this right is the requirement that juries be selected through a process that represents a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *United States v. Salamone*, 800 F.2d 1216, 1218 (3d Cir. 1986). Cohen also charges violation of the Jury Selection Act of 1968, 28 U.S.C. § § 1861 *et. seq.* (1982), which codifies the fair cross section requirement.[14] We conclude that Cohen did not satisfy each element of the applicable test established by the Supreme Court in *Duren v. Missouri*, 439 U.S. 357 (1979)[15] and, therefore, is not entitled to relief on this claim.

Duren requires that a defendant prove: (1) that the allegedly excluded group is distinctive in the community; (2) that the group's representation in jury pools is not fair and reasonable in relation to the number of its members in the community; and (3) that this underrepresentation is due to systematic exclusion in the jury selection process. *Duren*, 439

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however, given that neither he nor any of the appellants claim to be members of the allegedly excluded groups. *See Castaneda v. Partida*, 430 U.S. 482, 494 (1977) ("[I]n order to show that an equal protection violation has occurred . . . the defendant must show that the procedure employed resulted in substantial underrepresentation *of his [or her] race or of the identifiable group to which he [or she] belongs.*")(emphasis added). Cohen's standing is limited to the assertion of violations of the sixth amendment's and the Jury Selection Act's guarantee of a fair cross section. *see* Taylor v. Louisiana, 419 U.S. 522, 526 (1975), and we address these claims in this opinion.

14. The Jury Selection Act states "that all litigants in Federal courts entitled to trial by jury shall have the right to grand . . . juries selected at random from a fair cross section of the community . . . ." 28 U.S.C. § 186(I) (1982).

15. The same *prima facie* case is required to prove a violation of both the Act and the Sixth Amendment. United States v. Miller, 771 F.2d 1219, 1227 (9th Cir. 1985); United States v. Test, 550 F.2d 577, 584-85 (10th Cir. 1976).

U.S. at 364, *see also Salamone*, 800 F.2d at 1218. Each of these three elements must be demonstrated in order for the claim to succeed. *United States v. Pepe*, 747 F.2d 632, 649 (11th Cir. 1984). We hold that Cohen's claim falls on the third *Duren* ground and, in light of that conclusion, hold that he has failed to establish a violation either under the Jury Selection Act or under the Sixth Amendment.[16]

Juries in the District of New Jersey are selected pursuant to the guidelines set out in The Plan of Implementation of the United States District Court for the District of New Jersey Pursuant to the Jury Selection and Service Act of 1968, ("The New Jersey Plan"), *reprinted in* Supplemental Appendix of Appellee ("Supp. App.") at 87. The District is divided into three divisions, of which the Newark Division is the largest. Potential jurors' names are randomly selected from voter registration lists and automobile driver registration lists. *Id.* at 3, *reprinted in* Supp. App. at 89. The New Jersey Plan then provides for the merging of the names on the voters lists and the drivers lists, to create consolidated lists. *Id.* at 3-4, *reprinted in* Supp. App. at 89-90.[17]

The names of potential jurors that will comprise the master wheel are drawn randomly, as follows: "a starting number from one to 20 shall be drawn by lot, and the corresponding name shall be selected from the

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16. In light of our holding that the claim falls on the third *Duren* ground, we express no finding regarding the sufficiency of the claim on the first and second factors of the *Duren* test.

17. This methodology is consistent with the Jury Selection Act, which explicitly provides that either voter registration lists or lists of actual voters shall serve as a source for the names of prospective jurors and that plans to determine juror lists "shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by [this Act]." 28 U.S.C. § 1863(b)(2)(1982).

first list used along with each 500th name thereafter on that list and continuing with the remainder of the lists." *Id.* at 4, *reprinted in* Supp. App. at 90. The master jury wheel may consist of a "revolving drum, drawers of file cabinets or electronic data storage devices such as punched cards, magnetic tapes, or magnetic disc files." *Id.* at 7, *reprinted in* Supp. App. at 93. The wheel is emptied and refilled every four years, within nine months of the November election. *Id.* at 8, *reprinted in* Supp. App. at 94. The wheel from which Cohen's grand jurors were drawn, and which he contests, was emptied and refilled within nine months of the November 1984 election.

Cohen claims that the Plan systematically excluded the three groups that he has identified by its use of voter and driver lists as the exclusive source of names for the jury wheel and by the improper merging of these two lists of persons. His only factual support for his entire underrepresentation claim is an affidavit from a demographer, Dr. James O'Reilly, who compared a sample taken from the 1984 qualified-juror wheel to the adult population of Blacks, Hispanic-Americans and persons without a high school education in the Newark Division and concluded that the groups were substantially underrepresented.[18] Affidavit of James O'Reilly at 1-4, *reprinted in* Appellants' App. at 5242-45. Assuming arguendo that this affidavit supplies a statistical basis for the claim that the underrepresentation existed, it does not address why the Plan causes this underrepresentation. Cohen presents no proof to support his contention that the use of voter lists in fact causes systematic exclusion of

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18. Dr. O'Reilly adjusted upwards the Black and Hispanic-American population, based on his assumption of under-counting in the 1980 census. We will accept these adjusted population figures for purposes of this analysis.

these groups. Even if we accepted the argument however, that the *voter* lists underrepresent the groups identified by Cohen, his only argument for why *drivers* lists insufficiently supplement voter lists appears in a footnote in his motion to the district court: "In some communities use of the driver's license list as a supplement may be adequate to solve the problem . . . [h]owever, use of this list alone as the supplemental source is obviously insufficient in the peculiar urban communities comprising the Newark Division." Appellants' App. at 5264 (citation omitted). Cohen's conclusory statement that supplementation with drivers lists is "obviously insufficient" in these "peculiar urban communities" simply does not meet the most minimum requirement for making out a *prima facie* case. We hold, therefore, that Cohen has not made out a *prima facie* case of systematic underrepresentation in the grand jury venire.

VI.

Conclusion

In accordance with this opinion, we will affirm the judgments of convictions and sentences entered by the district court as to each appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

September 11, 1986
Bench Order

THE COURT: The defendant DiNorscio merely refers me to Batson v. Kentucky, and without supporting this reference with any argument or brief, complains that in violation of Batson the Government excluded Italian-Americans from the jury now sitting on this case.

Although I do not have a transcript of the voir dire proceedings, it is my recollection that he complained at side bar that the Government excluded four Italian-Americans and one black out of the seven challenges it exercised. I note that he has dropped any claim as to blacks and, indeed, we have black members of our jury.

Yesterday, in response to my question as to whether he was pressing his application with reference to Italian-Americans, he advised me that five Italian-Americans had been excused by the Government. I believe he is incorrect. To the extent that names mean what he takes them to mean, my notes reflect that the Government excused four prospective jurors with Italian names and the defense excused two, Mr. Frank Brescia and Miss Helen Lamantina.

Be that as it may, Batson v. Kentucky specifically dealt only with blacks in an equal protection analysis, and if there is one thing that is crystal clear from the opinion is that it is restricted to blacks. Indeed, the Chief Justice's dissenting opinion emphasized that the majority opinion is so limited. On that ground alone, the application is denied, raising as it does,

only challenges the Government addressed to the Italian-Americans. Indeed, under the explicit language of the opinion, to establish a prima facie case to which the Government must respond with a statement as to its explanation related to the particular case to be tried, a defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove the veniremen of the defendant's race, and that these and other circumstances raise an inference that the prosecutor used that practice to exclude the veniremen on account of their race. Slip Opinion at 16-17. But even if I, a district court judge, expanded the protection of Batson far beyond that which the Supreme Court explicitly chose not to do, the application would fail.

Relying solely on the last names of jurors, defendant argues that four of the seven challenges exercised by the Government were of Italian-Americans. Even assuming that to be true, at least one Italian-American juror is on the jury, and the defense, as I noted earlier, struck another two, the last defense challenge being exercised jointly by the defendants even after defendant made his record.

But in Batson the Supreme Court majority and the Chief Justice's dissenting opinion pay homage to the trial judge to see, to hear, and to protect against discrimination.

Now, we were in jury selection from 1:30 in the afternoon until almost 6 o'clock at night. The defense exercised 17 of its 18 challenges, and the Government, seven of its nine, and I excused somewhere between 15 and 20 prospective jurors for cause. Therefore,

when the 16 that were finally selected are added in, I individually questioned somewhere around 60 prospective jurors.

Two of the four Government challenges on purported Italian-American grounds clearly stand out in my memory, a fact of some considerable significance, given the tedium of the process and the fact that at this point I cannot remember even most of the many persons of whom I inquired.

The two jurors I most clearly remember, both very young men, should have been challenged by any responsible prosecutor on grounds having nothing to do with their ethnic background.

First, Mr. Aranjo, I think it was Juror Number 4, was a caricature of a young tough. As I described him the day before yesterday, he literally bopped to the stand with a know-it-all grin on his face; "bopped" being an

old-fashioned word for which I apologize, his hair was slicked back on the sides in a "D-A" style, yet many inches high on top, and all he lacked was a cigarette dangling from his mouth. He appeared to be a Fonzey with hair, an analogy I know is again outdated.

Indeed, one of the advantages of the perch on which I sit is that I could see that many of the counsel in this case, including the attorney making this application, were smiling as this prospective juror bopped into the box and answered my questions.

The second juror I vividly remember was Number 16, I think Carl Stiso. He was a wise guy. His initial answer to my questions was something to the effect that he would favor Italian-Americans because he was one, and he laughed a "try me" kind of a laugh. While he subsequently agreed that he could be a fair juror, I frankly did not believe him for a

minute. And when the Government waited one round before challenging him, I remember observing at a side bar, either on or off the record, "What took you so long?" If the Government had not challenged these two clowns it would have been remiss in its duties.

If the Government challenged two other Italian-Americans, I can only remember one of them and all I can remember about Miss Ferranti is that she was a very young woman. Defendants, of course, challenged two Italian-Americans as well. This application is bottomed on nothing -- on utterly nothing either factual or legal, and frankly, should not even have been dignified by these few remarks. The application for a hearing is denied.

All right.

MR. COOGAN: Your Honor --

MR. HOWES: Judge --

MR. COOGAN: I ask Your Honor how you arrived at the exercise of the defense challenges? I was under the belief that when we said "acceptable" that we had exhausted all but one of our challenges.

MR. RICHEY: I thought that's what we had done --

THE COURT: Is that what it is? See, I don't have that transcript. My records show two, but it's either one or two.

MR. COOGAN: Miss Costello, can you help us?

THE CLERK: I believe it was one.

MR. COOGAN: We were only one challenge allowed at the time we agreed.

THE COURT: All right. I'll amend this, or Mr. Stone will amend it. So you exercised 17 or your 18 instead of 16 of your 18.

MR. COOGAN: The reason I think that there is some importance to that, is because

no seasoned trial lawyer likes to be put in the position of having to use the last challenge when his adversary has additional challenges that can obviously be utilized to affect the composition of the then panel.

THE COURT: What does that have to do with what I've just done?

MR. COOGAN: It would have some effect, if Your Honor please, in terms of the ability to get a more -- a more balanced panel when I only have one challenge left, and your adversary has, I think, five left at the time.

THE COURT: That application is almost as ridiculous as the one that prompted me to return to the bench. If, indeed, at that time you felt you were prejudiced in any way, and that you wanted more challenges, it behooved you to ask. And I think the argument on its face, in any event, makes no sense.

I appreciate your trying to raise an issue, but I reject it.

MR. COOGAN: Your Honor, with regard --

THE COURT: Certainly three days into trial I reject it. All right.

MR. RICHEY: With regard to challenging a couple of Italian-Americans by the defense, I would note I could not determine who would be challenged and would not be.

I'm one of many attorneys in the defense group, and I'm not in the position to say who will and will not be challenged. That's one of the problems.

THE COURT: Well, you were there to participate with the others if you so chose. And if you chose not to do so, that is your problem. Nobody complained when I said that the challenges would be exercised jointly.

MR. COOGAN: I think we filed a motion.

THE COURT: The motion was denied pretrial and it was one of the few denials as to which no motion for reconsideration was filed.

MR. COOGAN: Yes.

THE COURT: And when I said they would be exercised --

MR. MUNROE: The court made a ruling.

MR. COOGAN: Your Honor --

THE COURT: This is too little, too late. If Mr. Richey chose to participate or not to exert his very considerable stature on his fellow counsel, that is Mr. Richey's problem and not mine.

Gentlemen, have a good evening.

MR. HOWES: Just one very brief thing, Your Honor.

MR. COOGAN: Thank you, Your Honor.

APPENDIX C

November 17, 1986
Sentencing

other families who suffer as a result of these activities. Activities for which neither defendant indicates any remorse.

Perhaps within a hundred and 20 days there will be some indication that these men are ready and willing to finally show some evidence of rehabilitation. Perhaps not. Be that as it may, all judges can really do is to fashion sentence to fit a crime and make a statement thereby.

Defendant DiNorscio, would you please rise.

For the purposes of sentencing only, Counts 1 and 2 are merged and the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of

25 years.

It is adjudged, that on Count 3 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 20 years, to be served concurrently with the sentences imposed on Counts 2 and 1, with a special parole term of six years to follow and a $5,000 fine.

Pursuant to Title 18 U.S.C. Section 3147, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of five years, to be served consecutive to the sentences imposed above. Therefore, it is the intention of the court that the sentence be 30 years imprisonment with six years special parole to follow and a $5,000 fine. A special assessment of a hundred dollars is imposed.

Mr. Cohen.

MR. DI NORSCIO: Thank you, Your Honor.

THE COURT: For the purposes of sentencing only, Courts 1 and 2 are merged, and it is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of 25 years.

Pursuant to Title 18 U.S.C. Section 3147, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of five years. This term sentence is to run consecutive to the 25 year sentence. Total aggregate sentence, 30 years. A special assessment of $50 is imposed.

Is there anything else?

MR. RICHEY: Yes, Your Honor, One matter.

I would call to the court's attention that the bond violation, at 813, 3547 [sic] violation, I suggest is an illegal sentence.

Constitution requires that people be indicted and they be convicted by a jury for a crime for sentencing. I suggest that such charge has not been brought, no indictment has been returned, no jury's found them guilty. Thank you.

THE COURT: If that's your position, please put in the papers.

Is there anything --

MR. ASHLEY: Your Honor, I join in the remarks of Mr. Richey and that's the extent to which I have anything to say.

THE COURT: All right. Is there anything else, Mr. O'Malley?

MR. O'MALLEY: Nothing else, Your Honor.

THE CLERK: All rise, please.

APPENDIX D

United States District Court
for District of New Jersey
Docket No. Criminal 86-223

United States of America
vs.
GIACOMO DI NORSCIO
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, NOVEMBER 17, 1986.

With counsel, WILLIAM RICHEY, Esq.

PLEA: Not Guilty.

FILED
NOV 18, 1986
At [3:00 P.M.]
WILLIAM T. WALSH
CLERK

FINDING & JUDGMENT:

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to distribute and possession with intent to distribute cocaine (Schedule II); engage in a continuing criminal enterprise; aid and abet in the intentional possession with intent to distribute cocaine (Schedule II).

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of
twenty-five (25) years on merged Counts 1 and 2; twenty (20) years on Court 3, to run concurrently with merged Counts 1 and 2 and a Special Parole term of six (6) years and a fine of $5,000.00.

IT IS FURTHER ADJUDGED that pursuant to Title 18, USC Sec. 3147, defendant is committed for a period of five (5) years to run consecutively to merged Counts 1 and 2 and Count 3.

SPECIAL CONDITIONS OF PROBATION:

IT IS FURTHER ADJUDGED that defendant pay a Special Assessment of $100.00.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation committed during the probation period.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/
MARYANNE TRUMP BARRY 11/18/86

Supreme Court, U.S.
FILED
JUN 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1664 and 88-6875

In the Supreme Court of the United States

OCTOBER TERM, 1988

GIACOMO DINORSCIO, PETITIONER

v.

UNITED STATES OF AMERICA

GERALD COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
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23pp

QUESTIONS PRESENTED

1. Whether petitioners were entitled under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to an explanation of the prosecutor's decision to strike five jurors with Italian-sounding names.

2. Whether petitioners' enhanced sentences under 18 U.S.C. 3147 (Supp. IV 1986) for committing an offense while on pretrial release are invalid on the ground that petitioners were not, at the time of their pretrial release, given notice of the potential penalty.

3. Whether petitioners showed that the United States District Court for the District of New Jersey systematically excludes blacks, Hispanic-Americans, and persons lacking high school educations from grand juries through its use of voter registration and drivers' license lists.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1664

GIACOMO DINORSCIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-6875

GERALD COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 864 F.2d 271.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1988. In three separate orders, Justice

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[1] "Pet. App." refers to the appendix to DiNorscio's petition, No. 88-1664.

Brennan granted each petitioner an extension of t me to and including March 23, 1989, within which to petition for a writ of certiorari, and both petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); petitioners DiNorscio and Cohen were additionally convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Supp. V 1987) (Count 2); and DiNorscio was convicted of a substantive cocaine distribution offense, in violation of 21 U.S.C. 841(a)(1) (Count 3).[2] DiNorscio was sentenced to a single term of 25 years' imprisonment on Counts 1 and 2, which were merged; a concurrent term of 20 years' imprisonment, to be followed by six years' special parole, and a fine of $5000 on Count 3; and a consecutive term of five years' imprisonment under 18 U.S.C. 3147 (Supp. IV 1986) (providing for an additional penalty for an offense committed while on release).

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[2] DiNorscio was acquitted on a count charging him with using the telephone to facilitate a drug violation, in violation of 21 U.S.C. 843(b), and Cohen was acquitted of the Section 843(b) count as well as a substantive cocaine distribution count. Co-defendants Vincent DiPasquale, Gerald DeLuca, and John Sinico were also convicted of conspiracy to distribute cocaine, and DeLuca was convicted of possession of cocaine with intent to distribute it. The court of appeals affirmed their convictions as well. During the trial five other charged co-defendants – Frank Suppa, Manuel Monteiro, Thomas Marino, Dick Pearson, and Robert Fisher – pleaded guilty.

Cohen was also sentenced to a single term of 25 years' imprisonment on the merged Counts 1 and 2, to be followed by a term of five years' imprisonment under 18 U.S.C. 3147 (Supp. IV 1986). Petitioner Truglia was sentenced to a term of ten years' imprisonment. The court of appeals affirmed. Pet. App. 1a-27a.

1. The evidence at trial, the sufficiency of which is not in dispute, derived largely from the testimony of co-conspirators, items seized from DiNorscio's and Truglia's homes, and tape-recorded conversations to which petitioners were parties. The evidence is summarized in the government's brief filed in the court of appeals. It showed that DiNorscio and Cohen were partners in a cocaine operation; it also showed that Truglia assisted in the distribution of the cocaine to wholesalers in New Jersey and other States. DiNorscio and Truglia, who both lived in Florida, received packages of cocaine, tested the drugs, and then arranged for the shipment of the cocaine to New Jersey and other States. At least once a week, and often several times each week, DiNorscio and Truglia also received and counted substantial cash proceeds from the drug sales.

2.a. During jury selection, the government exercised seven of its allotted nine peremptory challenges. See Pet. App. 31a-32a. It used five of those seven challenges to remove jurors with Italian-sounding surnames. *Id.* at 9a. Petitioner DiNorscio requested a *Batson* hearing[3] to require the government to explain its non-ethnic reasons for removing the five jurors, although counsel conceded at the time that "[i]t's impossible to tell by the names"

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[3] See generally *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

whether the jurors were Italian-Americans (Pet. App. 13a).

The trial judge concluded that *Batson* was limited to racially discriminatory practices and did not apply to the removal of Italian-Americans. Pet. App. 30a. She also noted that the defendants struck two persons with Italian surnames as well and that "at least one Italian-American" remained on the jury. *Id.* at 31a, 34a. (In fact, two jurors with Italian-sounding surnames remained on the jury. *Id.* at 10a.) The trial judge noted that she was best positioned "to see, to hear, and to protect against discrimination." *Id.* at 31a. She then referred to two of the jurors whom the government struck and explained that "[t]he two jurors I most clearly remember, both very young men, should have been challenged by any responsible prosecutor on grounds having nothing to do with their ethnic background." *Id.* at 32a. The first, she noted, "was a caricature of a young tough." *Ibid.* She described the second as a "wise guy" who initially said he would favor Italian-Americans because he was one, then recanted that statement, but the judge "frankly did not believe him for a minute." *Id.* at 33a-34a. As the trial judge summarized, "[i]f the government had not challenged these two clowns it would have been remiss in its duties." *Id.* at 34a. Accordingly, the trial judge denied the defense request for a *Batson* hearing at which the government would be obligated to proffer a neutral explanation for its use of its peremptory challenges to remove the jurors with Italian-sounding names.

b. The court of appeals affirmed. Pet. App. 9a-14a. It did not address the district court's ruling that *Batson* applies only to the use of peremptory challenges for racially discriminatory reasons (*id.* at 10a & n.9), but it

assumed arguendo that *Batson* applies to any cognizable ethnic or racial group (*id.* at 12a). The court concluded, however, that petitioners failed to establish that persons with Italian surnames constitute a cognizable group singled out for discrimination and disparately represented on juries in New Jersey. *Id.* at 12a, 13a. The court found in the record no evidence apart from the surnames that the five excluded jurors were members of a single ethnic group. And the court noted that, as petitioner DiNorscio conceded in the district court, it was "impossible" to determine whether the prospective jurors were Italian-Americans by their names alone. *Id.* at 13a. Nor was there any evidence that people with Italian-sounding surnames – who may not be Italian-Americans – comprise a single identifiable ethnic group. *Id.* at 14a. Thus, the court concluded, "DiNorscio has failed to carry his burden of demonstrating that a cognizable group for *Batson* purposes was impermissibly excluded from his jury and, therefore, we conclude that he has failed to establish a *prima facie* case of discrimination in the government's use of its peremptory challenges." *Ibid.*

3. The court of appeals also affirmed two other rulings by the district court that are pertinent here. First, the court held that petitioners DiNorscio and Cohen were properly given enhanced sentences under 18 U.S.C. 3147 (Supp. IV 1986) for committing crimes while on pretrial release. Pet. App. 18a-23a. The court rejected petitioners' contention that Section 3147 creates a separate offense that must be separately charged and presented to the jury, and their further contention – raised for the first time on appeal – that Section 3147 cannot be invoked if the defendants were not notified at the time of

their pretrial release of the penalties for committing crimes while on pretrial release.

Second, the court rejected a claim that the alleged underrepresentation on the grand jury of blacks, Hispanics, and persons with less than a high school education violated the Sixth Amendment's guarantee of an impartial jury. Pet. App. 23a-27a. The court bypassed two of the three factors in the test established by *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979), because petitioners had not made the requisite showing of the third factor, systematic exclusion in the jury selection process. The court noted that under the "New Jersey Plan" grand jurors are drawn from voter registration lists and automobile drivers' license lists, and that Cohen had made no showing that use of the latter list could lead to underrepresentation. As the court explained, "Cohen's conclusory statement that supplementation with drivers lists is 'obviously insufficient' in these 'peculiar urban communities' simply does not meet the most minimum requirement for making out a *prima facie* case." Pet. App. 27a.

ARGUMENT

1. Petitioners contend (DiNorscio Pet. 14-33; Cohen Pet. 11-18) that the prosecutor's decision to strike five jurors with Italian-sounding surnames constituted an impermissible use of peremptory challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals' rejection of that argument appears to rest on two alternative grounds. First, assuming without deciding "that the holding of *Batson* is not limited to black Americans, and applies to any ethnic or racial group that meets the criteria of cognizability delineated by the Supreme Court," Pet. App. 12a, the court held that Italian-Americans were

not a "cognizable" group. *Id.* at 10a-14a. Second, the court cited with apparent approval the district court's determination that "DiNorscio had not made the requisite factual showing * * * that *any* group was actually excluded." *Id.* at 10a. Further elaborating that point, the court of appeals found it significant that the final jury included two jurors with Italian surnames, and it concluded that petitioners had "failed to establish a *prima facie* case of discrimination in the government's use of its peremptory challenges." *Id.* at 14a. Those conclusions support the judgment of the court of appeals, which does not warrant review by this Court.

a. The court of appeals correctly held that petitioners had not shown that Italian-Americans are a "cognizable" group for *Batson* purposes, and its holding does not conflict with any decision of another court of appeals. Other than blacks, the only groups that any court of appeals has held to be "cognizable" for *Batson* purposes are Hispanics (*United States* v. *Alcantar*, 832 F.2d 1175, 1179-1180 (9th Cir. 1987)), American Indians (*United States* v. *Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987)), and whites (*Roman* v. *Abrams*, 822 F.2d 214, 227 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989)). By contrast, the courts of appeals have rejected attempts to extend *Batson* to nonracial contexts. See *United States* v. *Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) (women not a cognizable group under *Batson*), petitions for cert. pending, Nos. 88-5772 et al.; *Graham* v. *Lynaugh*, 854 F.2d 715, 722-723 (5th Cir. 1988) (18-year-olds not a cognizable group under *Batson*); *United States* v. *Cresta*, 825 F.2d 538, 545 (1st Cir. 1987) (young adults not a cognizable group), cert. denied, 108 S. Ct. 2033 (1988); *United States* v. *Sgro*, 816 F.2d 30, 32-33 (1st Cir. 1987) (defendants

made insufficient showing that Italian-Americans are a cognizable racial group), cert. denied, 108 S. Ct. 1021 (1988); *United States* v. *Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986) (black males as opposed to blacks not a cognizable group under *Batson*), cert. denied, 481 U.S. 1037 (1987). The decision of the court of appeals thus fits comfortably within a consistent pattern of decisions in the courts of appeals.

United States v. *Biaggi*, 853 F.2d 89 (2d Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989), is not to the contrary. The Second Circuit in *Biaggi* did not analyze the question whether Italian-Americans constitute a cognizable ethnic group. The court merely accepted without question the district court's conclusion that *Batson* applies and rejected the defendant's claim on the merits. Any conflict between the holding of the district court in *Biaggi* and the court of appeals here would not merit this Court's attention. But in any event there is no such conflict. The district court in *Biaggi* found that "Italian-Americans *in this district*" satisfy the criteria for determining a cognizable group. *United States* v. *Biaggi*, 673 F. Supp. 96, 100 (E.D.N.Y. 1987) (emphasis added). *Biaggi* is thus limited to the Eastern District of New York and cannot be read more broadly to require that Italian-Americans universally be recognized as a cognizable group. Indeed, the district court in *Biaggi* emphasized that its decision was not in conflict with the First Circuit's holding in *United States* v. *Sgro*, *supra*, that Italian-Americans had not been shown to be a "cognizable" group, because the court in that case reached a different conclusion on the basis of different facts and relevant circumstances. 673 F. Supp. at 101.

The consistent pattern of decisions in the courts of appeals reflects a correct understanding of *Batson*. *Batson* arose out of this Court's longstanding commitment to ensuring that jury selection is not infected by racial discrimination. In *Batson*, the Court relied heavily on its decision in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), which held that a State "denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at 85. Moreover, the Court repeatedly emphasized that the harm it sought to redress was that caused by purposeful racial discrimination. *Id.* at 86-88 (discussing evils inherent in racial discrimination in selection of venire); *id.* at 88-89 (reaffirming that peremptory challenges cannot be used to achieve "purposeful racial discrimination"); *id.* at 93-98 (relying on prior racial discrimination cases to delineate methods and burden of proving racial discrimination in selection of petit jury); *id.* at 98-100 (limitations on use of peremptory challenges outweighed by need to "ensure that no citizen is disqualified from jury service because of his race"); *id.* at 100-102 (White, J. concurring) (need to overturn *Swain* v. *Alabama*, 380 U.S. 202 (1965), demonstrated by "widespread" practice "of peremptorily eliminating blacks from petit juries").[4] The Court took pains to

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[4] See also *Brown* v. *North Carolina*, 479 U.S. 940, 940-941 (1986) (O'Connor, J., concurring in denial of certiorari) (*Batson* "depends upon this Nation's profound commitment to the ideal of racial equality" and does not extend to jurors' attitudes); *Gray* v. *Mississippi*, 481 U.S. 648, 672 (1987) (Powell, J., concurring in part and concurring in the judgment) (decision in *Batson* "justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors").

emphasize that, beyond the narrow sphere encompassed by the need to combat racial discrimination in jury selection, "the peremptory challenge occupies an important position in our trial procedures," *Batson*, 476 U.S. at 98, and that a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason at all, *id.* at 89.

In these circumstances, the courts of appeals have properly hesitated to extend *Batson* to nonracial groups in the absence of a compelling showing that such groups have suffered discrimination comparable to that suffered by blacks. And, of course, there was no such showing in this case. To the contrary, petitioners rest their case entirely on the proposition that no such showing should be required and that this Court should find Italian-Americans to be a cognizable group on the basis of judicial notice. DiNorscio Pet. 22-26; Cohen Pet. 14-15.

Furthermore, petitioners are not well situated to argue that commonly recognizable surnames are sufficient to identify a member of the cognizable ethnic group of Italian-Americans. Although they contend now that "[t]he shared ancestry of Italian-Americans is easily identifiable in their Italian surnames" (DiNorscio Pet. 21; Cohen Pet. 14), the contrary point was conceded in the district court when petitioner DiNorscio agreed – with no dissent from his co-defendants – that it was "impossible" to place an individual within that ethnic group simply by virtue of his surname. See Pet. App. 13a. In short, petitioners not only failed to press their claim that the district court should take judicial notice that the ethnic group of Italian-Americans is "easily identifiable," but they disavowed that claim explicitly. As the court of appeals stated, "DiNorscio offered no evidence from which the district court could reasonably have found that persons with Italian surnames are reliably identified as

members of a single ethnic descent, or that persons with such surnames 'either have been or are currently subjected to discriminatory treatment.'" Pet. App. 13a. Thus, even if there were some conflict in results among the circuits as to what constitutes a "cognizable" group, this would not be an appropriate case in which to consider that issue.

b. Even if it were clear that Italian-Americans in the District of New Jersey should be held to be a "cognizable" group for *Batson* purposes, the judgment of the court of appeals would still be correct, since the district court appropriately determined, and the court of appeals affirmed, that petitioners did not make out a prima facie case of discrimination against Italian-Americans. Out of nine prospective jurors with Italian-sounding surnames, two sat on the jury, two were struck by defense counsel, and five were struck by the government. Among the five struck by the government, two were such obvious candidates for peremptory challenge, on non-ethnic grounds, that the district court stated the government would have been remiss if it had not struck them. Thus, the government used only three unexplained challenges to strike jurors with Italian-sounding surnames – only one more challenge than the defendants themselves exercised against such jurors. Moreover, at the end of jury selection, the government had two unexercised challenges. "[A]ll relevant circumstances," *Batson*, 476 U.S. at 96-97, lead readily to the conclusion on these facts that no prima facie case of discrimination was made out. See *United States* v. *Dennis*, *supra* (no prima facie case when prosecutor used three of seven strikes to remove blacks and petit jury included two blacks); *United States* v. *Montgomery*, 819 F.2d 847, 850-851 (8th Cir. 1987) (no prima facie case when prosecutor used two of six strikes to

remove blacks, defense counsel removed a third black, and one black sat on jury); *United States* v. *David*, 662 F. Supp. 244, 246 (N.D. Ga. 1987) (no prima facie case when prosecutor used three of seven strikes to remove blacks and petit jury included one black), aff'd, 844 F.2d 767 (11th Cir. 1988). The district court, to which the prima facie case determination is entrusted (*Batson*, 476 U.S. at 97, 99 n.22), found in these circumstances that "[t]his application is bottomed on * * * utterly nothing either factual or legal." Pet. App. 34a.

There is no tension between the Third Circuit's statement that it is "significant[]" that two members of the jury had Italian surnames, Pet. App. 14a, and the correct statement in *United States* v. *Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), vacated in part on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 109 S. Ct. 28 (1988), that "the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." As the Eleventh Circuit recognizes, see *United States* v. *Dennis*, *supra*, the defendant must make out a prima facie case of discrimination before the government is called on to justify any strike, and the presence of members of the allegedly discriminated-against group on the jury is one significant factor in determining whether the defendant has met that burden. The Third Circuit is precisely in accord: in the present case, the court properly attached significance to that factor as one among several factors indicating the lack of a prima facie case, and in *United States* v. *Clemons*, 843 F.2d 741, 748, cert. denied, 109 S. Ct. 97 (1988), the same court recognized that it could not conclude that by itself the "inclusion of blacks on a jury bars a prima facie case, especially where

other facts and circumstances may constitute an inference of prosecutorial discrimination in the selection process." Compare also *United States* v. *Montgomery*, 819 F.2d at 850-851 (presence of blacks on jury together with existence of unexercised peremptory challenges prevents inference of prima facie case), with *United States* v. *Johnson*, No. 88-2225 (8th Cir. May 2, 1989) (same court concludes that prima facie case was shown despite presence of at least two blacks on the petit jury).

In short, the holding below that petitioners failed to establish a prima facie case of discrimination (even assuming that Italian-Americans are a "cognizable" group) properly rests on a number of facts and circumstances, including the presence of persons with Italian-sounding surnames on the jury and the government's failure to exercise all of its peremptory challenges. The court of appeals did not treat either of those facts as conclusive, but rather accepted a district court determination based on "all relevant circumstances," as specifically directed by *Batson*, 476 U.S. at 96-97. The court therefore followed the same approach as the Eighth and Eleventh Circuits and not, as petitioners contend, a contrary approach. There is no reason for this Court to review the issue.

2. Petitioners DiNorscio and Cohen challenge their consecutive sentences of five years' imprisonment under 18 U.S.C. 3147 (Supp. IV 1986).[5] DiNorscio Pet. 33-36;

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[5] Section 3147, as applicable before November 1, 1987, provided:

Penalty for an offense committed while on release

Cohen Pet. 30. Petitioners contend that no sentence can be imposed under Section 3147 unless the release order giving rise to the enhanced penalties under Section 3147 specifically informed the defendant of the penalties for committing an offense while on pretrial release. The court of appeals held that such notice is not a precondition to the imposition of sentence under Section 3147. Pet. App. 20a-23a. The court correctly reasoned that, although 18 U.S.C. 3142(h)(2)(A) (Supp. V 1987) requires such notice, a Section 3147 sentence should not fall because of the failure to comply with Section 3142(h)(2)(A), because "[t]he purpose of such advice is solely to impress upon the person the seriousness of failing to appear when required," S. Rep. No. 225, 98th Cong., 2d Sess. 25 (1984), and not to divest sentencing courts of the power to carry out Congress's will whenever an error has been made by the court that granted the

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> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to –
>
> > (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or
> >
> > (2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

Effective November 1, 1987, the minimum terms of imprisonment in subsections (1) and (2) have been eliminated. See 18 U.S.C. 3147 (Supp. V 1987).

defendant's release. See also *United States* v. *Feldhacker*, 849 F.2d 293, 299 (8th Cir. 1988) (dictum).

The reasoning of the court of appeals in rejecting petitioners' contention conflicts with the decisions of two other circuits that regard notice under Section 3142(h)(2)(A) as a precondition to sentencing under Section 3147. See *United States* v. *Cooper*, 827 F.2d 991, 994-995 (4th Cir. 1987); *United States* v. *DiCaro*, 852 F.2d 259, 264-265 (7th Cir. 1988). Petitioners, however, are not entitled to review by this Court, for two related reasons. First, the claim that petitioners now raise was not raised in the trial court and therefore should not be entertained here.[6] Second, petitioners completely failed to demonstrate in the district court – and have not even alleged in this Court – that they in fact were not notified of the penalties for committing an offense while on pretrial release. The record is accordingly devoid of any factual support for the proposition that petitioners lacked the notice that they contend is necessary in order for their Section 3147 sentences to be valid. See Pet. App. 20a ("DiNorscio * * * did not claim, at his sentencing,

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[6] DiNorscio erroneously suggests that the court of appeals rejected the government's contention that he failed to preserve this issue in the district court. DiNorscio Pet. 13 n.2. The court of appeals rejected the government's contention that DiNorscio failed to preserve a *different* argument pertaining to Section 3147 – that it establishes a criminal offense rather than merely a sentence enhancement. Pet. App. 18a n.12. No petitioner has pressed that argument in this Court. The argument that petitioners do press here – that Section 3147 cannot be applied in the absence of notice of its penalties at the time of pretrial release – was "raise[d] * * * for the first time on appeal," as the court of appeals expressly observed. *Id.* at 20a.

that he was unaware that he was subject to this penalty, and raises the claim for the first time on appeal.").

Even if petitioners' contentions did not suffer from those fatal defects, the conflict between the reasoning below and the reasoning of the Fourth and Seventh Circuits still would not merit this Court's review. The defendants in *DiCaro* and *Cooper* were both released before the effective date of Section 3142(h)(2)(A) (October 12, 1984). There is as yet no reported case in which a defendant released after the effective date of Section 3142(h)(2)(A) has shown that he failed to receive notice, as required by that section, of the penalties for committing an offense while on pretrial release.[7] There is therefore no reason to believe that a significant number of cases will arise in which courts have released defendants after October 12, 1984, but have failed to carry out their responsibility to give notice under Section 3142(h)(2)(A). The issue that petitioners raise accordingly would not be of sufficient continuing importance to warrant a grant of certiorari even if it had been properly preserved.

3. Petitioners Cohen and Truglia contend (Cohen Pet. 19-29) that the grand jury that indicted them did not represent a cross-section of the community, because blacks, Hispanics, and persons with less than a high school education were underrepresented on the master list from which the grand jury was selected. They urge that their showing met this Court's standards in *Duren* v. *Missouri*, 439 U.S. 357 (1979), and that the courts below erred in denying relief.

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[7] As we have noted, there has been no showing in this case that petitioners were not given the warning required by Section 3142(h)(2)(A).

Duren v. *Missouri*, 439 U.S. at 364, requires that a defendant asserting a constitutional defect in the selection of grand jurors show that (1) the excluded group is distinctive in the community; (2) the group's representation in jury pools is not fair and reasonable in relation to the number of its members in the community; and (3) the underrepresentation is due to systematic exclusion in the jury selection process. The court of appeals properly noted the *Duren* considerations and the requirement that all three factors be proved. Without addressing factors (1) and (2), the court concluded that petitioners failed in their showing that there is systematic exclusion of blacks, Hispanics, and the less educated in the selection process. Pet. App. 25a. The court specifically noted that in the District of New Jersey potential jurors are selected from voter registration and drivers' license lists. *Ibid.* It then found that petitioners failed to explain why the use of these two sources was inadequate to include a fair cross-section, including the groups allegedly excluded. *Id.* at 26a-27a. Concluding that petitioners failed to show in particular how the use of drivers' license lists would result in underrepresentation of distinct groups, the court of appeals found that petitioners "ha[ve] not made out a *prima facie* case of systematic underrepresentation in the grand jury venire." *Id.* at 27a.

Most of petitioners' discussion of this issue (Cohen Pet. 20-26) is devoted to the two issues on which the court of appeals assumed (without deciding) that petitioners *had* met their burden under *Duren*. When petitioners finally do address the issue that the court of appeals found dispositive, they urge the Court to "overrule that finding [that there was not a prima facie case of systematic exclusion]" – a task that this Court ordinarily

will not undertake[8] – on three grounds. They first urge that "the voter registration lists and the driver registration lists do not fairly represent the community." *Id.* at 28. Yet petitioners do not cite a single case in which the use of voter lists has been held inadequate, and they completely fail to show how the use of voter lists, as supplemented by drivers' license lists, leads to systematic exclusion in the selection process. Thus, petitioners fail to address the basic flaw that the court of appeals found in their argument: their failure to explain how the use of driver lists could lead to systematic underrepresentation. Pet. App. 27a. Petitioners urge that "there appears to be an improper merging of lists." Cohen Pet. 28. Yet no elaboration, factual or legal, is offered to support that assertion.

Finally, in the sole paragraph of their petition that addresses the issue that the court of appeals found dispositive, petitioners urge that the defect in the use of drivers' license lists is that they contain bad addresses, and that "Blacks, Hispanics and the less educated tend to be disproportionately transient and it is expected that a large number of 'bad addresses' are of potential Blacks, Hispanics and less educated jurors." Cohen Pet. 28. Yet that argument was never made – much less supported by evidence – in the courts below, where petitioners dealt with this issue only in a conclusional footnote to their motion in the district court. See Pet. App. 27a. Moreover, petitioners do not explain what source might exist that would contain significantly fewer bad addresses than drivers' license lists. Their sole suggestion as to how the government might alleviate the alleged

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[8] See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

disparity – better follow-up on bad addresses – rests on the unsupported factual assertion that "there appears to have been little, if any follow-up of unreturned questionnaires," Cohen Pet. 28, an assertion that was refuted by the affidavit of a district court clerk (C.A. Supp. App. 104-105).

Petitioners' attempts to cure the defects in their showing on the third *Duren* factor thus are factually unsupported and come too late. As the court of appeals concluded, petitioners' showing below "simply [did] not meet the most minimum requirement for making out a *prima facie* case." Pet. App. 27a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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